Office-Supreme Court, U.S.
FILED
APR 13 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1326

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. WATT, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. Respondents contend (Br. in Opp. 13-15) that the consistency requirements of the Coastal Zone Management Act of 1972 (CZMA), as construed by the court of appeals, are benign and, in principle, no different from countless other statutes requiring federal agencies to conduct an "environmental review" (*id.* at 15) of their proposed actions at an early stage in the planning process. In this respect, respondents fundamentally misstate the nature of the consistency provisions of the CZMA. As we explained in our petition (at 21; see also *id.* at 9), Section 307(c)(1) of the CZMA imposes *substantive* limitations on federal activities; indeed, if the CZMA's consistency provisions required only that the Secretary of the Interior "consider" or "review" the possible effects of Outer Continental Shelf (OCS) oil and gas activities on adjacent states' coastal zone management programs, it is extremely doubtful that the government would be seeking this Court's review, or even

that this litigation would have arisen at all, because the government already conducts comparable reviews under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Instead, this controversy is due to respondents' insistence on the premature application of a substantive limitation on federal activities. Respondents themselves, while seeking to downplay the importance of the decision below, at the same time recognize its momentous significance for the balance of power between the states and the federal government when they assert that "directly affecting" must be broadly construed in order to "ensure the comprehensive coastal management authority" of the states (Br. in Opp. 2; see also respondents' Cross-Petition in No. 82-1511, at 6-7, 10). Thus, respondents' citations to statutes[1] and case law[2] that require federal agencies to conduct procedural reviews of the possible future or cumulative impacts

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[1]For example, the Mineral *Lands* Leasing Act, 30 U.S.C. 201(a)(3)(C) (Br. in Opp. 13 n.18), requires the Secretary of the Interior to "consider effects which mining of the proposed lease" might have on the surrounding area. It also requires the Secretary to "evaluate and compare" the effects of various mining techniques prior to issuing a lease, but this evaluation "shall not prohibit the issuance of a lease." A substantive limitation — maximum economic recovery — based on such an evaluation is imposed only at a later stage: approval of the mining operation plan.

[2]*California* v. *Watt*, 668 F.2d 1290 (D.C. Cir. 1981) (Br. in Opp. 14-15), involved Section 18 of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA), 43 U.S.C. (Supp. IV) 1344, which requires the Secretary to develop a five-year leasing schedule for OCS lease sales after gathering and evaluating information concerning various factors identified in the statute. The court noted that Section 18 does not impose substantive limits on the ultimate decisions reached by the Secretary: "The Act does not mandate any particular balance, but vests the Secretary with discretion to weigh the elements * * *" (668 F.2d at 1317). Thus, Section 18 is comparable to NEPA, imposing essentially procedural duties. See *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980). Respondents' reliance on NEPA case law (Br. in Opp. 13 n.19, 16 nn.24-25) is thus inapposite here.

of their actions at the early stages of a project are irrelevant to the present controversy. The decision below represents far more than a new paper-work requirement, a fact attested to by respondents' vigorous attempts to defend their victory.

2. Respondents claim (Br. in Opp. 26-28) that the decision below will reduce, rather than generate, future controversies. In the OCS lease sale context alone, however, the Ninth Circuit's decision already has provided a fertile ground for litigation. Since the decision in August 1982, the Department of the Interior has prepared 29 consistency determinations for ten OCS lease sales scheduled to be held between October 1982 and August 1983.[3] As of this date, nearly every lease sale held subsequent to the Ninth Circuit's decision has drawn a legal challenge based, in part, on the Coastal Zone Management Act. See *North Slope Borough, et al.* v. *James G. Watt, et al.*, No. A82-421 (D. Alaska) (Sale BF-Beaufort Sea); *Association of Village Council Presidents, et al.* v. *James G. Watt*, No. A83-150 (D. Alaska) (Sale 57-Norton Sound); *Conservation Law Foundation* v. *Watt*, No. 83-0506 MA (D. Mass. Mar. 28, 1983) (Sale 52-North Atlantic); *Village of False Pass, et al.* v. *James G. Watt, et al.*, No. A83-176 (D. Alaska) (Sale 70-St. George Basin). In the Massachusetts case, the district court enjoined the lease sale for, *inter alia*, alleged noncompliance with the CZMA. Despite a 30-page consistency determination that the court acknowledged satisfied all procedural requirements of the CZMA and its implementing regulations, the court in effect held that the Secretary

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[3]As noted in our petition (at 19 n.18), the Department of the Interior has prepared consistency determinations in an effort to avoid injunctions against lease sales that are to be held prior to this Court's disposition of this litigation. Multiple consistency determinations are often necessary for a single OCS lease sale because more than one state may be adjacent to the sale area.

had not satisfied his *substantive* burden of establishing full consistency with Massachusetts' coastal zone management program. *Conservation Law Foundation* v. *Watt*, *supra*, slip op. 34-35, 40, appeal pending, No. 83-1258 (1st Cir.). The court further held that the Secretary may not rely on the State's authority under Section 307(c)(3)(B) of the CZMA to deal with specific problems as they arise at later stages to establish the required degree of consistency at the lease sale stage (slip op. 40). Contrary to respondents' assertions, therefore, the massive interference with the OCS oil and gas leasing process forecast by petitioners (Pet. 19-20) is clearly evident.[4]

In contexts other than the OCS oil and gas program as well, consistency determinations are being demanded by the states for a wide variety of federal actions that do not themselves cause any direct physical impacts on the coastal zone, on the theory that such actions represent the "first link in a chain of events" (Pet. App. 13a) that eventually could lead to coastal zone effects. These actions include planning activities of the National Park Service, the Bureau of Land Management, and the Fish and Wildlife Service; land acquisition and disposal;[5] and the development of guidelines for future permitting decisions. Each of these activities

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[4]Application of substantive limitations at the lease sale stage, as required by the Ninth Circuit's decision and by the more recent Massachusetts decision, is particularly inappropriate in the context of the OCS oil and gas program. Although respondents disparage (Br. in Opp. 4-5, 16-17) the effectiveness of the step-by-step OCS decisionmaking process, they have been unable throughout this litigation to identify one possible coastal zone effect that is not capable of being reviewed and controlled at the appropriate time.

[5]The courts have recognized that the transfer of a property interest to or from the federal government often is not the crucial decision for environmental planning purposes. See, *e.g.*, *United States* v. *162.20 Acres of Land, More or Less, Situated in Clay County*, 639 F.2d 299, 304 (5th Cir.), cert. denied, 454 U.S. 828 (1981) (National Historic Preservation Act); *South Dakota* v. *Andrus*, 614 F.2d 1190 (8th Cir.

involves a preliminary federal decision that leaves the states free to ensure consistency with their programs when actual activity is to be undertaken or permits issued. Thus, the court of appeals' decision in this case has affected a broad range of federal programs by imposing a premature substantive limit on federal decisionmaking.[6]

3. Inexplicably, respondents rely (Br. in Opp. 19) upon an opinion of the Department of Justice's Office of Legal Counsel (OLC) in support of their contention that the Ninth Circuit's decision is in full accord with the views of the federal government. Memorandum Opinion for the General Counsel, Department of Commerce, and the Solicitor, Department of the Interior, No. 79-28, 3 Op. Off. Legal Counsel 189 (1979). It would apear that respondents failed to read the entire OLC opinion. It is true that the opinion concluded that the consistency requirements of Section 307(c)(1) of the CZMA do apply to lease sales, a position that respondents acknowledge the government supported during the course of this litigation (Br. in Opp. 9 & n.12). What respondents ignore, however, is that portion of the OLC opinion that reviewed the then-existing federal regulations implementing Section 307(c)(1); those regulations substituted the term "significantly" for the statutory term "directly" and then defined "significantly" in terms of "primary, secondary, and cumulative effects." 3 Op. Off.

1980) (NEPA). In the CZMA context, the federal project for which the land is being acquired, rather than the mere fact of acquisition, is the proper subject of consistency review. In the case of disposition, the land will be subject to the State's plenary authority once it leaves federal hands. In either circumstance, therefore, consistency review for an acquisition or disposal decision may be entirely inappropriate even though that decision could be viewed as the "first link in a chain of events" (Pet. App. 13a) that may ultimately lead to coastal zone effects.

[6]As previously noted (see pages 1-3, *supra*), Section 307(c)(1) of the CZMA goes well beyond mere "consideration" or "review" of the states' coastal zone management programs.

Legal Counsel, at 196. The OLC opinion stated that "we are unable to accept an interpretation that would dilute 'directly,' first to 'significantly' and then to 'primarily, secondarily, and cumulatively' " (*id.* at 197). The opinion unequivocally declared that "the conformity requirement of § 307(c)(1) applies only to the preleasing activities of the Department of the Interior *directly* affecting the Coastal Zone" (*ibid.*; emphasis added). As a result of this opinion, the regulations that substituted the term "significantly" for "directly" in Section 307(c)(1) were withdrawn (44 Fed. Reg. 37142 (1979)). Accordingly, the 1979 regulations (see Br. in Opp. 18) restating the conclusions reached in the OLC opinion in no way contradict the government's legal position.

In short, it is respondents' arguments (Br. in Opp. 16-18) and the court of appeals' decision (Pet. App. 13a) that conflict with the OLC opinion, rather than the government's position in this Court. Just as OLC found that NOAA had exceeded its authority in substituting lesser standards for the statutory phrase "directly affecting the coastal zone," so too the court of appeals impermissibily substituted its judgment for that of Congress when it based its decision on the purported cumulative and future effects of an OCS oil and gas lease sale, rather than its *direct* effects.

4. Respondents rely on recent — 1980 and 1981 — committee reports to establish the meaning of the term "directly affecting the coastal zone" in the OCS lease sale context (Br. in Opp. 22-23, 25). These reports, however, were not prepared in connection with the enactment or amendment of the consistency provisions of the CZMA or the OCSLA. Instead of illuminating the meaning of "directly affecting the coastal zone" as enacted by Congress in 1972, the language of these reports represents "only the personal views of

the[] legislators" sitting in the majority on committees eight and nine years later. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974), quoting *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967); *TVA* v. *Hill*, 437 U.S. 153, 193 (1978).[7]

As detailed in our petition (at 16-18), Congress confronted the problem of integrating the consistency provisions of the CZMA with the staged system of federal decisionmaking under the OCSLA in the 1976 Amendments to the CZMA. In that measure, Congress rejected consistency review of exploration, development and production activities at the leasing stage and prescribed a step-by-step consistency regime for such activities when the respective stages in the OCS process are reached (see Pet. 17).

However, when the CZMA was reauthorized in 1980, as noted in the petition (at 12 n.14), language was inserted in the committee reports suggesting that regulations reflecting an expansive view of the term "directly affecting the coastal zone" be adopted (Br. in Opp. 22-23).[8] Furthermore, when regulations reflecting the government's interpretation of the phrase, and not respondents', were adopted in 1981, a resolution of disapproval was passed by the House Committee

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[7]Respondents also rely (Br. in Opp. 24) on language from a 1971 Senate Report, S. Rep. No. 92-526, 92d Cong., 1st Sess. 20, as bearing on the proper definition of the term "directly affecting the coastal zone" first introduced into the CZMA a year later. Two points must be mentioned. First, the language in the report refers to unique areas of the OCS, such as channels or bays, with close proximity to the coastal zone and not to activities on the OCS as a whole. Second, the quoted language is not reflected in the bill reported to the Senate in 1971; at most, it constitutes advice that, in 1971, the Congress was not prepared to enact into binding law.

[8]The 1980 legislation did not amend or reenact the consistency provisions of Section 307 of the CZMA. The language inserted in the committee reports, therefore, was unrelated to the legislation then before Congress.

on Merchant Marine and Fisheries on a sharply divided (20-15) vote. In relying on this resolution, however, respondents fail to point out that the dissenting members, including some of those who sat on the Committee in 1972 and participated at conference in 1976, wrote that the resolution "is inconsistent with the previous actions of Congress * * *." H. Rep. No. 97-269, 97th Cong., 1st Sess. 16 (1981). They explained that "the Conference Committee [in 1976], in which some of us participated * * * reject[ed] the notion that absolute consistency should apply in all cases during the planning for, and holding of, lease sales." *Id.* at 17. Further, the dissenters stated (*ibid.*):

> To now argue that we intended otherwise is completely contrary to these facts. All other attempts, subsequent to our 1976 action, which try and impose a gloss on such actions are similarly defective and should be dismissed as the dicta they represent.

We do not offer these statements as direct support for our interpretation of Section 307(c)(1) or for our position on the merits in this litigation. Instead, these congressional remarks illustrate that the so-called post-enactment legislative history upon which respondents so heavily rely (Br. in Opp. 22-23, 25), and which was created in the midst of the legal controversy that this case presents, does not constitute the universal opinion of the legislative branch.

The Court has often stated that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960); see also *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). This observation is especially apt here because the available evidence establishes that the 1980 and 1981 reports are not reliable expressions of congressional intent in 1972. The membership of the committe had

radically changed since 1972,[9] and could not be presumed to have special knowledge of the meaning intended by the original legislation. Moreover, the views expressed in the reports are those only of the majority of the members sitting on the committees in 1980 and 1981; they were never directly voted upon by either House of Congress. To attach substantial weight to the cited committee reports would essentially relegate the meaning of statutory terms to the statements of transitory majorities of committees in post-enactment sessions of Congress.

5. Finally, a word should be said concerning the Court's experience with statutes concerning the environment and the nation's natural resources. These statutes, although lofty of purpose, almost always reflect compromise between the opposing interests of development and protection. Time after time, the government has had to seek this Court's intervention because the lower courts have substituted what they perceived to be wise public policy for the words of the statute Congress enacted. See, *e.g.*, *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151 (1981) (experimentation with bidding systems under OCSLA); *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139 (1981) (hypothetical EIS under NEPA for nuclear weapons storage); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223 (1980) (imposition of substantive standards under NEPA); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) (imposition of procedural requirements beyond those prescribed by statute and regulation); *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 137-138 (1977) (cross petition) (provision for variances for new

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[9]Indeed, of the members voting on the 1981 resolution of disapproval only six (of 35) sat on the committee in 1972. Five of these six voted against the resolution, *i.e.*, against the majority statement relied upon by respondents.

sources under the Clean Water Act); *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976) (comprehensive EIS under NEPA when there was no proposal for comprehensive action before the agency). We submit that this is another such case. Stripped to its essentials, the court of appeals substituted its vision of the purposes of the CZMA for the language actually employed by Congress in Section 307(c)(1) of that Act. In so doing, moreover, the court seriously altered the balance struck by Congress between the competing interests of the state and federal governments in the planning and control of the nation's energy resources. Such judicial overreaching requires correction by this Court.

CONCLUSION

For the foregoing reasons and the reasons in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1983

DOJ-1983-04